

To: Bonnie Lovelace

From: Edward Hayes, DEQ Staff Attorney

Date: January 19, 2012

Subject: Preemption of State Jurisdiction Over Interstate Pipelines.

In enacting 49 USCS §§ 60101, *et seq.*, Congress gave the United States Department of Transportation regulatory authority over pipeline safety. The purpose of 49 USCS §§ 60101, *et seq.*, is to provide adequate protection against risks to life and property posed by pipeline transportation and pipeline facilities. This statutory scheme requires the Secretary of Transportation to prescribe minimum safety standards for pipeline transportation and for pipeline facilities. The term pipeline “facility” is defined to include hazardous liquid pipeline facilities and the term “hazardous liquid” is defined to include petroleum products. The safety standards that the Secretary of Transportation is authorized to prescribe include “design, installation, inspection,, emergency plans and procedures, testing, construction, extension, operations, replacement, and maintenance of pipeline facilities.

49 USCS §§ 60101, *et seq.*, provide for State assumption of jurisdiction over intrastate pipeline transportation and pipeline facilities. Under this assumption of jurisdiction, a State may adopt additional or more stringent safety standards for intrastate pipeline transportation and intrastate pipeline facilities.

49 USCS § 60104(c), however, contains the following preemption of State jurisdiction over interstate pipeline transportation and pipeline facilities:

A State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation.

The safety standards prescribed by the Secretary of Transportation that are applicable to interstate pipeline transportation and pipeline facilities are contained in the Pipeline Hazardous Materials and Safety Administration (PHMSA) regulations set forth at 49 CFR Part 195. These federal regulations are intended to ensure adequate protection of the public and the environment and to prevent crude oil pipeline accidents and failures.

A brief overview of these regulations is provided to illustrate the scope of state regulation of interstate pipelines that is preempted by 49 USCS § 60104(c). 49 CFR Part 195, Subchapter B, contains requirements for periodic reporting and for reporting of accidents and safety-related conditions. The accident reporting requirements apply to releases of five gallons or more of a hazardous liquid. 49 CFR Part 195, Subchapter C, contains minimum design requirements for new pipeline systems and for relocating, replacing, or otherwise changing existing systems. Operating pressure, valve installation, and minimum wall thickness of pipelines are included in the features that are subject to the design requirements. 49 CFR Part 195, Subchapter D, contains minimum requirements for constructing new pipeline systems and for replacing or otherwise changing existing systems. These construction requirements include, in part, welding specifications, a provision that the pipeline be buried to a level below cultivation, backfilling specifications, and the installation of valves, including a requirement that valves be installed on

each side of a water crossing that is more than 100 feet wide from high-water mark to high-water mark. (The Pipeline Safety, Regulatory Certainty, and Job Creation Act of 2011 amended 49 USCS 60102 to give the Secretary of Transportation the authority to require by regulation the use of automatic or remote-controlled shut-off valves, or equivalent technology, where economically, technically and operationally feasible. Such regulations have not yet been promulgated.) 49 CFR Part 195, Subchapter F, contains minimum requirements for operating and maintaining pipeline systems. The operator of a pipeline is required to prepare and follow a manual for conducting 1) normal operations; 2) maintenance activities; 3) abnormal operations; and 4) emergencies. The Administrator of the Pipeline and Hazardous Materials Safety Administration has the authority to require the operator to amend the manual as necessary to provide a reasonable level of safety.